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No. 253

In the Supreme Court of the United States

OCTOBER TERM, 1958

PATRICK A. MCKENNA, PETITIONER

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR, AND JOHN C. DEARMAS, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR FRED A. SEATON, SECRETARY OF THE INTERIOR, IN OPPOSITION

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OPINIONS BELOW

The District Court did not write an opinion. The opinions of the Court of Appeals, not yet reported, are set out in the appendix to the petition (Pet. App. 18-30).

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 1958. A petition for rehearing was denied on May 9, 1958. The petition for a writ of certiorari was filed on August 5, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior acted arbitrarily in permitting post-filing amendment of applications for oil and gas leases, without loss of time priority, so as to bring the application into accord with the Secretary's own view of the pertinent regulation, where the application as originally filed conformed to the regulation as previously understood and enforced by the Bureau of Land Management.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 13-15.

STATEMENT

This suit was instituted to enjoin the Secretary of the Interior from issuing an oil and gas lease of acquired lands of the United States to respondent De-Arman, or to declare any lease issued to be void, and to compel the Secretary to issue a lease covering such acquired lands to petitioner. Section 3 of the Act of August 7, 1947, 61 Stat. 914, 30 U.S.C. 351-359, known as the Mineral Leasing Act for Acquired Lands, App., *infra*, p. 13, authorized the Secretary to issue leases on acquired lands (with exceptions not here material) "under the same conditions as contained in the leasing provisions of the mineral leasing laws." Section 10, App., *infra*, p. 14, authorized the Secretary to make necessary rules and regulations to carry out the purposes of the Act, "which rules and regulations shall be the same as those prescribed under the mineral leasing laws to the extent that they are applicable."

The mineral leasing laws thus made applicable to acquired lands, and pertinent to this case, are Sections 17 and 27 of the Mineral Leasing Act of February 25,

1920, as amended by the Act of August 8, 1946, 60 Stat. 951, 954, 30 U.S.C. 226 and 184, App., *infra*, p. 13.

As of the time of passage of the Mineral Leasing Act for Acquired Lands, the public lands regulation promulgated by the Secretary to implement the acreage limitation of Section 27 of the Mineral Leasing Act, 43 C.F.R., 1946 Supp., 192.42 (e), App., *infra*, p. 14, required applications to list the public land leasehold interests of the applicant in the same State with a reference to their serial numbers. In 1948, the regulation was amended to require additionally that an applicant affirmatively state that he owned no more than the permitted acreage, 13 F.R. 9567, 43 C.F.R., 1949 ed., 192.42(a)(3). By a further amendment of the public land regulation, effective January 28, 1951, the requirement that the leasehold interests of the applicant be listed was eliminated, and the applicant was required to use a prescribed form which contained a statement to the effect that he did not own leases in the same State covering more than the statutory maximum of 15,360 acres.[1] 15 F.R. 8583, 43 C.F.R., 1951 Supp., 192.42(a), App., *infra*, pp. 14-15.

The first acquired lands regulations were issued on December 15, 1947, and the regulation relating to authorized acreage paralleled the public land regulation then in effect by requiring that an applicant list by serial number the government leases he already held. 12 F.R. 8678, 43 C.F.R., 1949 ed., 200.5, App., *infra*, p. 15. When the Secretary as of January 28, 1951, revised the public land regulation to eliminate the listing

[1] The allowable acreage was increased to 46,080 by the Act of August 2, 1954, 68 Stat. 648, 30 U.S.C. Supp. V, 184. This is immaterial to this case since it is not questioned that respondent DeArmas held less than the 15,360 acre maximum.

of leases already held, no corresponding change was made in the acquired land regulation. However, as a practical matter, the Bureau of Land Management, after 1951, merely required of an applicant for a lease on such lands the statement that the applicant's holdings did not exceed the statutory limit without listing the leases so owned.[2] This was the situation when respondent DeArmas on April 2, 1951, filed his original application for a lease of 1,865.36 acres of acquired land in Louisiana. That application contained only the statement that "Applicant's interests, direct or indirect, in oil and gas leases or in applications for oil and gas leases, on any lands owned by the United States, do not exceed 15,360 acres of land in the State of Louisiana."

In what is known as the first *Hooper* decision, 61 I.D. 346, the Secretary held in 1954 that the precise requirements of the acquired land regulation were mandatory, that Hooper's application (which was like DeArmas' application) was properly rejected because of failure to list his other interests, that such a defect could be cured but not without loss of priority, and that the lease must be awarded to a second applicant who, subsequent to Hooper's application, had filed an application which listed the applicant's other interests. The second *Hooper* decision was issued on October 28, 1954, 61 I.D. 350. This decision recites that the Director, Bureau of Land Management, requested reconsideration of the first *Hooper* decision. This memorandum informed the Secretary that as a matter of administrative practice and construction the Bureau had, since the revision of the public land regulation to eliminate listing, effective January 28, 1951, considered that revision to be like-

[2] The existence of this policy is found as a fact in the second of the two *Hooper* decisions hereinafter discussed (61 I.D. 350).

wise applicable to acquired lands, and that since November 29, 1950, the date the public land regulation was revised, many acquired lands applications had been filed without the detailed statements of the applicant's other interests required by 43 C.F.R. 200.5 (the acquired lands regulations) and leases had been issued on the basis of such applications. The Bureau expressed the belief that, to deny priority to all applications which prior to the first *Hooper* decision failed to list other interests, would be "a harsh result in view of the administrative practice regarding this regulation." The Secretary noted that when he decided the *Hooper* case on August 3, 1954, he was not aware of the Bureau practice and, although he considered the practice "not legally justifiable," he held that:

> fairness and equity would seem to require that an applicant or a lessee who has filed an application deficient in this respect in reliance upon the administrative construction should be given time to cure the defect by supplying the details required by the regulation without loss of priority, if all else is regular. * * *

Furthermore, "in the circumstances, in the interest of administrative fairness," the Secretary ruled that "Mr. Hooper and other similarly situated who prior to August 31, 1954, filed applications defective in the respect described in this decision will be allowed to and including December 1, 1954, to submit the statement of other interests required by 43 C.F.R. 200.5 without loss of priority to their applications."[3]

[3] Following this decision, the Secretary, on November 3, 1954, revised 43 C.F.R. 200.5 (the acquired lands regulations) to eliminate the listing of other interests requirement. 19 F.R. 7127, 43 C.F.R. 200.5, App. *infra*, p. 15.

The facts in the instant case are similar to those in the *Hooper* case. The present leaseholder, respondent DeArmas, filed his application for a lease on the acquired lands in 1951, without listing his specific leaseholdings and their serial numbers, but did declare that his holdings did not exceed the statutory limit. The first *Hooper* decision was announced on August 3, 1954. On August 17, 1954, in a patent attempt to have the technical terms of the first *Hooper* decision foreclose respondent DeArmas, whose application had been pending for more than three years, petitioner filed his application which listed his individual holdings. On October 21, 1954, DeArmas filed a corrected application listing his holdings. On October 28, 1954, the second *Hooper* decision was issued, authorizing such correction without loss of priority. Petitioner McKenna on January 24, 1955, filed a protest against DeArmas' application which was rejected by both the Bureau of Land Management and by the Solicitor, acting for the Secretary; the DeArmas application was sustained on the basis of the second *Hooper* decision. A lease was issued to DeArmas on May 18, 1956.

This suit was instituted on May 21, 1956, against the Secretary of the Interior. Petitioner contended that DeArmas was not the first qualified applicant because of the technical deficiency in his original application, alleged that the Secretary's action was illegal, and prayed for a declaratory judgment that the DeArmas lease is void. Respondent DeArmas was allowed to intervene, and he, the Secretary, and petitioner filed motions for summary judgment.

On June 20, 1957, the District Court entered its judgment denying petitioner's motion and granting the motions of the Secretary and DeArmas for summary

judgment. On appeal, the judgment of the District Court was affirmed, one judge dissenting. The majority held that the Secretary's decision was "an entirely fair, reasonable, and rational administrative action." It did not reach the further point urged by respondent DeArmas, with which the Secretary disagreed, that the acquired land regulation was automatically nullified when the public land regulation was changed.

ARGUMENT

The Secretary's resolution of the controversy between petitioner and respondent DeArmas is clearly not subject to mandamus since the matter he was called upon to decide unquestionably involved an exercise of that judgment and discretion committed by Congress to him alone. "Neither an injunction nor mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion." *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316, 324. Cf. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318, where mandamus was recognized as "a remedy long restricted, * * * in the main, to situations where ministerial duties of a nondiscretionary nature are involved." No such case is present here. The majority below noted a long line of decisions by this Court and other courts establishing that "the primary responsibility for the solution of such questions as this, arising in the administration of the land laws, is with the Secretary of the Interior, whose decision will not be superseded by the courts except under limited conditions." The minimum requirement justifying "judicial repudiation of administrative action by the Secretary" was stated

by the majority to be "that he is plainly wrong" (Pet. App. 25).

It is apparent from a mere reading of the Statement, *supra*, that the Secretary's action in allowing DeArmas (and others in his situation) a period in which to amend his application without loss of priority cannot be said to be plainly wrong. Indeed, while it is not required that the Secretary's determination of the matter be shown to be plainly right, the holding of the majority that "he was right, and well within his lawful authority, in holding that DeArmas was the first qualified applicant" rests not alone on reason but also on authority.

1. There is no question but that DeArmas met every statutory qualification for a lease. His application met the practice and the regulations as interpreted by the Bureau of Land Management at the time he filed in April 1951, which practice and interpretation remained the official administrative practice and interpretation until it was changed by the Secretary in August 1954, in the first *Hooper* decision.[4] It would be unjust and inequitable to deprive DeArmas of his rights since his application complied with an administrative practice which, whether right or wrong, nevertheless was the practice at the time he filed. As the Secretary

[4] The Bureau's interpretation is understandable. As the majority below noted (Pet. App. 22), the acquired lands statute contemplated parallel procedures as nearly as possible, and a statement that the applicant did not hold other interests exceeding the statutory limit, required by the amended public land regulation (43 C.F.R. 192.42 (a)), was just as effective to establish the statutory qualification as a detailed listing of other interests as required by the unchanged acquired lands regulation (43 C.F.R. 200.5) would have been. Hence, the Bureau obviously considered either that the acquired land regulation no longer applied, or that it had been impliedly amended to conform to the public land regulation. And subsequently, of course, the acquired lands regulation was so changed.

pointed out in the second *Hooper* decision, in allowing amendment without loss of priority he was but following a policy already fixed in cases where regulations were amended. The courts, of course, have long held that a change in construction of a statute should be applied only prospectively. *Great Northern Ry.* v. *Sunburst Co.*, 287 U.S. 358, 364; *Warring* v. *Colpoys*, 122 F. 2d 642, 645-647 (C.A. D.C.); cf. *United States* v. *Alabama Railroad Company*, 142 U.S. 615, 621.

This case is not different in principle from *El Paso Brick Co.* v. *McKnight*, 233 U.S. 250, cited by the majority below (Pet. App. 24) and ignored by petitioner. There, there was no question but that the Brick Company had qualified under the law for a patent to government land, but had furnished as part of its proof an affidavit of posting not executed by an officer residing in the land district as required by the statute. Nevertheless, it was stated by this Court that "irregularities in complying with such directory provision could be cured, and when cured, as it was here, the patent should have been issued" (233 U.S. at pp. 258-259). Likewise, here there is no question of DeArmas being qualified under the statute. The case here is even stronger since, until the Secretary changed the practice in the *Hooper* decision, there was actually a compliance with both the statute and regulations under the prevailing administrative practice at the time he filed.

The petition is pitched entirely on Judge Prettyman's dissenting opinion. Unquestionably his view is that the regulations must be followed, and that in no case may a departure from them be excused. We agree that, as a general proposition, regulations are mandatory, but we do not agree that, where an applicant's application complies with the regulations as administratively

interpreted at the time he files, a subsequent change in that interpretation defeats his rights. Contrary to Judge Prettyman's view, the Secretary is not hog-tied by his regulations in cases such as this. "It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice." *Williams* v. *United States*, 138 U.S. 514, 524.

Nor is there substance to petitioner's claim (Pet. 10-15) that the decisions of the court below, in *McKay* v. *Wahlenmaier*, 226 F.2d 35; *Seaton* v. *Texas Company, et al.*, Nos. 13,636, 13,637, decided May 8, 1958; and *Barash* v. *Seaton*, No. 14,069, decided April 25, 1958, and the decision here, show a conflict of views between different panels of the court below. The three decisions just cited all turn on their particular facts, as does the instant case, and none of those cases presented a situation such as is presented here.

Finally, there is no substance to petitioner's claim of conflict (Pet. 15-16) between the decisions below and this Court's decisions in *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, and *Service* v. *Dulles*, 354 U.S. 363. The majority opinion properly held these cases distinguishable (Pet. App. 23). The cases are, of course, totally different from the instant case. The essence of both is that administrative procedures relating to trial of personal charges against individuals, as prescribed by regulations, cannot be sidestepped, prejudged, or ignored by the head of a Department.

Here there has been no denial to petitioner of any of his administrative remedies, nor any prejudging of the same. Petitioner's sole complaint is that he disagrees with the Secretary's decision on the merits of the controversy between petitioner and respondent DeArmas, which, as we have shown, was for the Secretary to decide, and which, it is submitted, he decided correctly. Since the *Service* and *Accardi* cases related to procedural irregularities which could be cured by further action under the correct procedures, they are irrelevant here where the question is one of adjustment after the event of the relative rights of contesting parties where errors have occurred, and the result of the decision must be that one claimant loses the property right he sought.

2. Moreover, since the regulations for acquired and public lands have now been conformed, it is apparent that their former applicability does not present a question of importance for review by this Court.

3. The lack of substance in petitioner's claim (Pet. 16-17) that there was a genuine issue of material fact which precluded summary judgment is indicated by the fact that neither the majority nor dissenting opinions below took any note of it. Rule 56(c) of the Federal Rules of Civil Procedure (Pet. 5) requires that summary judgment be rendered "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact * * *." Both the Secretary and respondent DeArmas in their motions expressly alleged that no such issue existed. Counsel for respondents twice stipulated that petitioner be allowed to file an answer, but no answer, and thus no challenge of the allegations in the motions, was ever filed by petitioner. Instead he filed a similar motion for judgment in which

he stated that it appeared from "the pleadings and the admissions of the defendant and the intervenor [respondents Seaton and DeArmas] in their respective motions for summary judgment * * * there is no genuine issue as to any material fact." That is to say, no such issues existed either as to respondents' or petitioner's motions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER, 1958.

APPENDIX

The pertinent provision of Section 17 of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, 60 Stat. 951, 30 U.S.C. 226, read as follows:

> * * * When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding. * * *

The pertinent provision of Section 27 of the above-cited Act, as amended, 30 U.S.C. 184, reads:

> * * * No person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate fifteen thousand three hundred and sixty acres granted hereunder in any one State; * * *

The pertinent provision of Section 3 of the Mineral Leasing Act for Acquired Lands of August 7, 1947, 61 Stat. 914, 30 U.S.C. 352, reads:

> Except where lands have been acquired by the United States for the development of the mineral deposits, by foreclosure or otherwise for resale, or reported as surplus pursuant to the provisions of the Surplus Property Act of October 3, 1944 (50 U.S.C., sec. 1611 and the following), all deposits of coal, phosphate, oil, oil shale, gas, sodium, potassium, and sulfur which are owned or may hereafter be acquired by the United States and which are within the lands acquired by the United States * * * may be leased by the Secretary under the same conditions as contained in the leasing provisions of the mineral leasing laws, subject to the provisions hereof. * * *

Section 10 of the Mineral Leasing Act for Acquired Lands, 30 U.S.C. 359, reads:

> The Secretary of the Interior is authorized to prescribe such rules and regulations as are necessary and appropriate to carry out the purposes of this Act, which rules and regulations shall be the same as those prescribed under the mineral leasing laws to the extent that they are applicable.

The relevant public land regulations promulgated under the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, 30 U.S.C. 181, *et seq.*, are as follows:

> Circular 1624, 11 F.R. 12958, 43 C.F.R., 1946 Supp., 192.42(c), October 28, 1946.
>
> § 192.42. *Applications for noncompetitive leases.*
>
> * * * * *
>
> The application must contain in substance the following:
>
> * * * * *
>
> (c) A statement of the interests, direct and indirect, held by the applicant in oil and gas leases, and applications therefor on public lands in the same State, identifying by serial number the records wherein such interests may be found.
>
> * * * * * *
>
> Circular 1773, 15 F.R. 8583, 43 C.F.R., 1954 Supp., 192.42(a), effective January 28, 1951
>
> § 192.42. *Offer to lease, and issuance of lease.*
>
> (a) To obtain a noncompetitive lease, an offer to accept such a lease must be made on Form 4-115s, "Offer and Lease Form, * * *. [The form referred to contained a statement to the effect that the

applicant's lease holdings did not exceed the statutory limit of 15,360 acres in the same State.]

The relevant regulations promulgated under the Mineral Leasing Act for Acquired Lands, 61 Stat. 913, 30 U.S.C. 351-359, are as follows:

Circular 1668, 12 F.R. 8678, 43 C.F.R., 1949 ed., 200.5(a), December 15, 1947

§ 200.5. *Supplemental information required in lease or permit applications, and place for application-filing.* In addition to the information required by the appropriate regulations, referred to in § 200.4, each application for a lease or permit must contain (a) a separate statement of the applicant's interests, direct and indirect, in leases or permits for similar mineral deposits, or in applications therefor, on Federally-owned acquired lands in the same State, identifying by serial number the records where such interests may be found, * * *.

Circular 1886, 19 F.R. 7127, 43 C.F.R. 200.5(a)(1), November 3, 1954

§ 200.5. *Supplemental information required in offers and applications for leases and permits; place of filing.* (a) Each offer of application for a lease or permit must contain (1) a statement that applicant's interest, direct or indirect, in leases, permits or applications for similar minerals does not exceed a maximum chargeable acreage permitted to be held for that mineral in federally owned acquired lands in the same State, * * *.